

Findings of Fact

Claimant suffered a series of personal injuries by accident beginning May 6, 1995, through April 8, 1996, with a stipulated date of accident of January 9, 1996.

Claimant was referred to Dr. Deborah T. Mowery for examination and treatment. February 1996 tests revealed mild carpal tunnel syndrome in claimant's right upper extremity with no testing being performed on the left upper extremity as, at that time, it was not clinically indicated. Claimant returned to work on February 23, 1996, with restrictions consisting of one hour of layout scaling alternating with one hour of proofreading.

When claimant returned to work with respondent on February 23, 1996, her right arm began to hurt and swell. She testified the area between her fingers would turn black and blue and she would be forced to run hot and cold water over her arms during breaks in order to alleviate the pain. Claimant saw Dr. Mowery on March 6, 1996, at which time, claimant's right upper extremity symptoms were diminished and again there were no symptoms noted to the left upper extremity. Again Dr. Mowery imposed restrictions of alternated one hour grasping with one hour no grasping and no overtime. Dr. Mowery's diagnosis at that time was carpal tunnel syndrome and tendonitis. Claimant did not return to work until April 1, 1996, at which time she attempted to perform her job tasks but was only successful at staying on the job for a brief period of time. Claimant returned to work on April 3rd and worked 3 hours and again on April 5th and worked 7 hours although she actually spent 5 hours working and the remainder of the time talking with a co-employee named Margaret Peck and nursing her arm.

Claimant did not work on April 4, 1996, she called in sick on April 8, 1996, and was a no call, no show on April 9, 10, and 11, 1996, at which time she was terminated from her employment with respondent due to poor attendance.

Claimant was examined by Dr. Lynn D. Ketchum on April 6, 1996, to determine what, if any, treatment was needed. Dr. Ketchum recommended, as had Dr. Mowery, that claimant use a brace at work. He felt Dr. Mowery's restrictions regarding claimant's return to job were appropriate. Both Dr. Ketchum and Dr. Mowery were presented the opportunity to review a videotape of the layout scaling and proofreading jobs claimant had been performing on light duty. While the doctors opined that the job duties exhibited in the videotape were probably within claimant's abilities, Dr. Ketchum expressed concern about the layout scaler position which he felt may involve grasping outside of her restrictions if the grasping were on a repetitive basis. Dr. Mowery also opined that if claimant returned to work under these restrictions and the activities caused claimant's arms to knot up, it would be an indication these jobs were beyond her abilities and claimant should not be performing those activities. Claimant testified that on each of her attempts to return to work April 1, April 3, and April 5, 1996, she developed problems with her upper extremities while performing the work tasks. The problems included swelling, knots forming in her arms, black and blue areas between her fingers, and increased pain.

While there were jobs that claimant felt she could perform, including a quality assurance job that she had performed before, these jobs were not offered to claimant.

Dr. Ketchum found that claimant had suffered a 15 percent whole body functional impairment as a result of the work-related injuries. Dr. Mowery opined claimant's functional impairment was 5 percent of the whole person resulting from her chronic pain. The Administrative Law Judge, in considering the opinions of both Dr. Ketchum and Dr. Mowery, awarded claimant a 10 percent whole body functional impairment and the Appeals Board, in considering the evidence in the record, affirms same.

Respondent contends that claimant's failure to remain at the offered light duty job constitutes a violation of the policies set forth by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk the claimant was placed on work restrictions after suffering a back injury. The employer then offered claimant a different job within the restrictions at the same rate of pay, but the claimant rejected the offer. The Court of Appeals, in denying claimant a work disability, found that "[t]o construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."

Claimant argues that this case is more akin to Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995). In Guerrero, a similar circumstance existed in that claimant suffered accidental injury, was returned to work at light duty, and provided an accommodated job within his restrictions. A substantial difference in Guerrero was that the claimant returned to work and attempted to perform the work which was indicated to be within her restrictions. However, in Guerrero, Dr. Melhorn had advised respondent that the claimant's job assignment was repetitive and increased her chances of further injury. The Kansas Court of Appeals found Guerrero too different from Foulk and held the claimant's attempt at the job, although unsuccessful, was sufficient to avoid the limitations set forth in Foulk and entitled claimant to a work disability.

The Appeals Board in considering claimant's attempts to return to work and the increase in symptomatology occurring on each occasion, finds claimant's circumstances to be more akin to Guerrero than Foulk. The Appeals Board considers Dr. Ketchum's concerns regarding the layout scaler job, and the concerns expressed by Dr. Mowery regarding a possible resurgence of her symptoms, as legitimate medical concerns regarding whether the offered positions were truly within claimant's physical abilities. In this instance, it appears as though the jobs offered, even though accommodated jobs, caused additional aggravation of claimant's condition and do not support a denial of work disability.

Claimant's entitlement to a work disability in this matter is controlled by K.S.A. 44-510e(a) which states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee

performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

While both physicians provided opinions regarding claimant's functional impairment, only Dr. Ketchum provided an opinion regarding claimant's ability to perform work tasks as required by the statute. Dr. Ketchum, in considering the report of Michael Dreiling, felt claimant had a 50 percent decrease in her ability to perform tasks when computing the individual tasks and an 84 percent loss of task performing ability when using a time weighted basis. The Appeals Board in the past has considered and accepted time weighting by vocational experts and physicians when considering a claimant's ability to perform prior work tasks. However, in this instance, the time-weighted method is neither explained nor justified by Dr. Ketchum. Therefore, the Appeals Board finds Dr. Ketchum's opinion using individual tasks without time weighting is the most credible evidence and finds claimant has suffered a 50 percent loss of task performing abilities.

The Appeals Board must also consider the difference between claimant's average weekly wage at the time of injury and the average weekly wage that the claimant is currently earning. As claimant was unsuccessful in her attempts to find employment after leaving respondent, the Appeals Board finds claimant has suffered a 100 percent loss of wage earning at this time. Considering both claimant's task loss ability and wage loss ability, the Appeals Board finds claimant has suffered a 75 percent permanent partial general body work disability as a result of the injuries suffered while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 23, 1997, should be, and is hereby, modified and claimant, Carol M. Wunder, is granted an award against the respondent, Jostens Printing & Publishing, and its insurance carrier, Travelers Indemnity Company, for injury occurring as stipulated on January 9, 1996, for a 75 percent permanent partial work disability based upon an average weekly wage of \$314.00.

Claimant is entitled to 6.86 weeks temporary total disability compensation at the rate of \$209.34 per week in the amount of \$1,436.07, followed by 311.25 weeks permanent partial disability compensation at the rate of \$209.34 per week totalling \$65,157.08 for a 75% permanent partial disability, making a total award of \$66,593.15.

As of May 8, 1998, there is due and owing to claimant 6.86 weeks temporary total disability compensation at the rate of \$209.34 per week in the sum of \$1,436.07, followed thereafter by 114.43 weeks permanent partial disability compensation at the rate of \$209.34 per week totalling \$23,954.78, for a total due and owing of \$25,390.85 which is ordered paid in one lump sum minus amount previously paid. Thereafter, claimant is entitled to 196.82 weeks permanent partial disability compensation at the rate of \$209.34 per week totalling \$41,202.30 until fully paid or until further order of the Director.

Future medical is awarded upon proper application to and approval by the Director.

The claimant's contract for attorney fees is approved insofar as it is not in contravention to the limitations contained in K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows.

Nora Lyon & Associates	\$247.80
Appino & Biggs Reporting Service	333.21
Gene Dolginoff & Associates	677.75
Waters Court Reporting Service	214.40

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Kenneth J. Hursh, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director